No. 12,777

IN THE

United States Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED
(a corporation),
Plaintiff-Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY, and MONTGOMERY BROTHERS, a partnership,
Defendants-Appellees.

APPELLEES' REPLY BRIEF.

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STATEMENT OF CASE.

Montgomery Brothers, a copartnership consisting of Frederick H. Montgomery and W. Ray Montgomery, has been in the business of representing Eastern manufacturers since 1920 (R. 313). In the representation of Eastern manufacturers the practice was to purchase the articles at a price, and resell them at a profit.

In 1942 Montgomery and Fenwal entered into a contract similar to the one involved in these proceed-

ings, and thereafter the annual purchases from Fenwal were as follows: In 1942, $39,876.18; 1943, $63,-077.64; 1944, $75,636.57; 1945, $228,609.73; 1946, $256,-169.78; 1947, $229,895.00; and 1948, $266,822.06.

The sales by Montgomery of the articles involved in these purchases during the same years were as follows: 1942, $47,712.91; 1943, $80,875.64; 1944, $83,-950.07; 1945, $292,279.79; 1946, $347,603.72; 1947, $284,258.49; and 1948, $356,920.44 (R. 321).

The difference between the purchase price and sales price was Montgomery's profit on these transactions during the years involved.

By the agreement dated May 26, 1944, the same business relations were continued as existed under the prior contract. This contract provides for no time of payment by Montgomery, and provides that Montgomery will use its best efforts to obtain orders for switches, and further provides that the agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days' written notice given by the ordinary manner to the last known address of the other party (R. 86).

Montgomery had established a line of credit which was satisfactory to Fenwal, and it was so stipulated at the trial (R. 210). Fenwal never advised Montgomery that the failure to pay one invoice or statement would cause Fenwal to desist and discontinue business (R. 354-355). In 1947 the January, February and March invoices were all received at one time

(R. 151). No default on the contract was claimed or deliveries refused.

In the performance of the contract Montgomery would place the order with Fenwal. Fenwal, during the entire time of performance under any of its contracts with Montgomery, accepted all orders and never refused to accept any order (R. 207, 208, 209 and 216). Very often the orders were placed without release or delivery dates (R. 88), as the aircraft companies couldn't give those dates at that time, but they would be sent just as quickly as they were received by Montgomery (R. 328).

On December 29, 1948, Fenwal wrote to Montgomery as follows:

> "This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty days after the receipt by you of this letter.
>
> We believe it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone, but we shall be glad to confer with you about this if you feel that it is desirable that we do so" (R. 96 and 97).

On January 7, 1949, Montgomery answered Fenwal's letter of December 29th which, in part, is as follows:

> "We have expended large sums of money and unlimited man hours by our sales and engineering staff in developing applications and securing orders for your equipment * * *.

> Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to accept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders.
>
> * * * we will welcome the opportunity of discussing any matters with Mr. Storkerson as undoubtedly he is planning a trip to the Pacific Coast'' (R. 99 and 100).

Telegrams were exchanged between Montgomery and Fenwal, and an appointment was arranged in San Francisco for January 24th (R. 102 and 103).

Storkerson, the General Manager of Fenwal, arrived in San Francisco on January 24th and had a conference with W. Ray Montgomery and Fred Montgomery. The purpose of his trip was to try to work out a termination agreement with Montgomery (R. 107, 223, 224, 225, 237, 298 and 342). At this conference on January 24th Storkerson stated that he came to talk over with Montgomery the possibilities of some settlement of the whole affair (R. 198), and handed Montgomery a letter dated January 20, 1949, from Fenwal answering Montgomery's letter of January 7, 1949. In this letter Fenwal states:

> ''* * * we shall not try to discuss details in this letter.
>
> Our Mr. Storkerson will talk with you in San Francisco in the near future, and it is our hope that you and he will be able to work out a mu-

tually satisfactory plan for handling the problems which are involved in the termination of our business relationship" (R. 104, 105 and 106).

At this conference Storkerson said: "I said that on all orders which we hadn't accepted that were to be shipped or where shipments were to be made against them after the end of the termination period, that I felt an adjustment should be made in the profits to be allowed Montgomery Brothers. And I believe I made some suggestions on it" (R. 109).

Storkerson further stated: "The reasons I gave for the proposal were to give them a fair and equitable settlement arrangement to the best of our ability. And, further, we discussed, I am sure, and as I remember it, the fact that there would be a problem involved in this termination and that I felt that the orders—continuing orders after the termination date would have to be assigned to our company * * *" (R. 110).

Storkerson further testified: "That led up to the question of what we were going to do on the basis of our probable acceptance of the termination terms, and I suggested to Mr. Ray Montgomery that the best way to handle it I thought would be for he and I together to visit the various aircraft companies who were the principal accounts, particularly in the Los Angeles territory, and announce to them a cessation, the effort being that while we knew that eventually and as soon as possible that—and we discussed this—that assignments would have to be made in that area

for that to be handled properly, we did not wish to involve customers who really had nothing to do with the business between Fenwal and Montgomery Brothers. So it was agreed that we would proceed on that basis" (R. 113 and 298).

Ray Montgomery and Storkerson met in Los Angeles on January 27, 1949, for the purpose of straightening out affairs with various aircraft companies in Los Angeles (R. 114). Several aircraft manufacturers were called upon, and the conversation at each meeting was substantially the same. Montgomery did most of the talking and stated that Montgomery Brothers was going to cease representing Fenwal in the area on March 1st, and that Fenwal would be operating directly with the aircraft companies, and that Fenwal would get in touch with them later. Montgomery thanked them for the business they had given them, and told them that he hoped to be able to continue on in the northern territory representing Fenwal. He further stated that Fenwal and Montgomery were in agreement that the termination should take place. This conversation was had at all of the aircraft companies, and it took a period of several days to contact the companies (R. 116). It was further stated that everybody wanted to make the transition as smooth as possible for the customers (R. 41 and 232). Fenwal was to make no sales on its own behalf during the months of January and February, 1948 (R. 230).

Storkerson testified as follows: "I had already previously told him (Ray Montgomery) that we would,

under no circumstances entertain the idea of renewing any contract with Montgomery Brothers which would be set up on the basis of the one we had just cancelled'' (R. 117).

Montgomery carried on its usual activities of getting all possible orders and pressing orders, and keeping their customers satisfied, during the months of January and February (R. 230, 237 and 389).

Montgomery's profit for orders lodged with Fenwal in January and February, 1948, was $36,525.20 (R. 72).

Montgomery was to take on the business in January and February and to place orders during that time. Fenwal made no sales during the interim (R. 230), and Montgomery was to continue the normal pursuit of orders and to solicit the same (R. 231).

In 1947 Montgomery Brothers complained that there was a three months' delay in billing from Fenwal, and stated that they would like to have statements before the tenth of each month because it was difficult for Montgomery Brothers to check the accounts unless monthly statements were received (R. 151). The statements provided for a discount if the bills were paid before the tenth (R. 147), and later on the discount rate was changed from 1% to one-half of 1% (R. 170).

Montgomery Brothers were proceeding to obtain all possible orders and operating under the agreement before March 1st, and while negotiations were being

carried on to determine the profit that Montgomery was to receive for orders placed before March 1st but not to be delivered until after March 1st. Fenwal sent a telegram on February 21, 1949, as follows: "January check not received. Please advise whether sent" (R. 145). Montgomery Brothers responded on February 23rd as follows: "Prefer to withhold January check until future relations are established as suggested in our letter February 6 Y 15" (R. 172).

On February 24th Fenwal threatened to stop shipments and notify customers of reason and arrange to satisfy them on deliveries, whereupon Montgomery wired that the contract did not provide for payment on February 10th, and that if Fenwal interfered with their contracts with customers Fenwal would be held in damages (R. 175 and 176).

Montgomery Brothers at that time were bound to deliver on all orders which had been taken from the aircraft companies during January and February and which had been taken with the consent and approval of Fenwal, with no notification of a refusal to accept the orders. The articles to be sold were all patented articles and could not be obtained by Montgomery Brothers from any other source than Fenwal (R. 118).

On February 25th Fenwal for the first time stated in a telegram "the terms on our order acceptances and invoices which you hold are one-half per cent 10 days net 30 days permission to pay the month's bill-

ings on the 10th of the following month was per a special agreement * * *'' (R. 117 and 178).

On February 26, 1949, Montgomery wired that they were not refusing payment of invoices and that they expected all Fenwal customers to be protected by prompt deliveries (R. 180).

Fenwal wired Montgomery on February 28, 1949 (being the last day of the termination period) that they would discontinue shipments on orders (R. 182).

On March 3, 1949, after the termination date, Fenwal wrote to Montgomery attempting to cancel certain orders (R. 185, 186, 187, 188 and 189).

On March 5th Montgomery wired Fenwal that no amounts were admittedly overdue, and that Fenwal would be held liable in damages for all contracts which were cancelled (R. 189 and 190).

Thereafter Storkerson met Ray Montgomery on March 9, 1949, in Los Angeles and Storkerson testified the following occurred: "I suggested that we arrange for assignments immediately so that the customers could be taken care of and that shipments could be released to the various people who were expecting shipments here on the west coast (R. 192 and 193).

An agreement was prepared and signed between Montgomry and Fenwal providing for the assignment to Fenwal of any and all unfilled orders for Fenwal products (R. 195), and thereafter assignments were

made specifically covering each of the aircraft companies involved (R. 54-66).

Fenwall filled all orders which had been obtained from Montgomery Brothers in which transactions Montgomery Brothers had a profit of $38,103.18, subject to adjustment for rejections, which net amount was stipulated to be $36,525.20 (R. 72). It is this amount that is in controversy and for which the trial Court rendered a judgment in favor of Montgomery Brothers.

ARGUMENT.

The contract between the parties was one for purchase and sale. Montgomery agreed to purchase at certain prices and Fenwal agreed to sell at those prices (R-6, Articles III and IV). Montgomery was to be Fenwal's exclusive representative in that territory (R. 5, Article I). The relationship between the parties was to be that of buyer and seller and not that of employer and employee. The agreement could be terminated by either party upon 60 days' written notice. The contract was silent as to any of the problems that should arise should the termination provision be exercised.

On December 29, 1948, Fenwal mailed to Montgomery a notice of termination (R. 96), and on January 7, 1949, Montgomery acknowledged the termination notice but informed Fenwal that Montgomery expected the buyer-seller relationship to continue during the interim period (R. 98 and 99).

The position taken by Fenwal required Montgomery to continue to represent Fenwal under the contract; however, Fenwal would honor only those orders forwarded by Montgomery that Fenwal chose to accept, and Fenwal would not allow Montgomery any profits on orders accepted by Fenwal that were to be delivered after the 60-day termination period. On January 20, 1949, Fenwal wrote Montgomery as follows:

> "We note you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of release and dates of shipment, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. * * * It seems likely that the filling of these orders will involve an adjustment of the discount or commission allowed to you, * * * We cannot be required to accept orders given by you or by anyone else * * * we are surprised that you think we should fill orders in the manner outlined in your letter." (R. 105).

Mr. John Storkerson, testifying for Fenwal, said:

> "* * * our position was that they were not entitled to profits after the 60-day period." (R. 109.)

Montgomery contended that this was an unwarranted condition and could not be implied from the termination provision. *The Uniform Sales Act,* Section 42 (Civil Code of California, Section 1962; Gen-

eral Law of Massachusetts, Chapter 106, Section 31, Appellant's Brief, page 9) provides:

> "Section 42: Delivery and Payment are Concurrent Conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, i.e., *the seller must be willing and ready to deliver possession of the goods to the buyer in exchange for the price* * * *" (Italics ours).

There was a conflict of testimony as to the right of Fenwal to refuse any or all of the orders submitted by Montgomery during this period. The Court properly found that Fenwal had no legal right to refuse any of the orders submitted by Montgomery and made a finding that, as a matter of law, all orders submitted by Montgomery during the termination period had been accepted by Fenwal (R. 77, Article IV). All of these orders were actually filled and delivered by Fenwal. *The finding that there had been no breach of contract by Fenwal is dependent upon the finding that all orders forwarded by Montgomery had been accepted.* These two findings must stand together.

The bone of the contention of Fenwal lies in the unwarranted assumption that Fenwal could rescind the contract on grounds of an alleged material breach by Montgomery. This assumption has no grounds, either in logic or law.

In the first place, the conduct of the parties clearly showed the lack of any intent to make delivery and

payments concurrent conditions. Such a construction had never been exacted—all transactions had been on a credit basis. In the plaintiff's Exhibit No. 15, dated May 20, 1947, Montgomery wrote Fenwal:

> "* * * the last statement we received from you was for January, February and March period. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statment every month." (R. 151.)

This clearly shows that with respect to the contract in question, *at the time that that contract was entered,* there was no intent on the part of Fenwal to receive payment 10 days after shipment. The contract contains no date for payment. In fact, Fenwal's invoices were rendered on a haphazard schedule that made it difficult for Montgomery to check.

During the entire period of the contract, both Fenwal's acceptance order (R. 92) and invoice (R. 147) contained terms allowing a discount by the purchaser if the balance should be paid within 10 days. Montgomery subsequently negotiated for the privilege of receiving this discount, and Fenwal agreed to grant the discount for early payment (Plaintiff's Exhibits 19 and 20, R. 167, 170).

This subsequent agreement provided that if Montgomery should choose to pay in 10 days, they would be allowed a discount. This agreement was collateral to the original agreement and presented no condition

of immediate payment, but was clearly an option allowing Montgomery an additional profit if he chose to pay earlier than on the haphazard schedule manifested by the parties. The mere fact that Montgomery chose to avail themselves in the past of an optional discount cannot obligate Montgomery to always choose to pay earlier.

The parties attempted by discussion and correspondence to settle the question of construction of the termination clause. Fenwal requested (R. 102) and Montgomery agreed (R. 103) to meet to discuss an amicable settlement of their differences. The parties met and discussed the matter in great detail; a settlement was tentatively arranged on the basis of a different measure of recovery for Montgomery and a new contract for representation (R. 74 and 75). Pursuant thereto, a written contract was tendered by Fenwal (R. 127 through 133) and Montgomery submitted their points of difference as to their understanding of the previous oral agreement (R. 134 through 142). The trial court found that the points of discussion in the attempt to reach an agreement of settlement involved the future contract for representation (R. 74 and 75). Fenwal attempted to separate the issues, and insisted that Montgomery pay the amount Fenwal claimed was due to Fenwal before proceeding with the contract for future representation (R. 174). Fenwal, in spite of Montgomery's contention that the two issues were dependent (R. 172) terminated the negotiations for a settlement. Since the parties were

unable to agree, Montgomery was entitled to a court construction of the terms of the termination provision. *Papenfuss v. Webb Products Co.,* 24 Cal. App. (2d) 559, 563; *Restatements of Contracts,* Section 302 a.2.

In addition, the contention of Fenwal that Fenwal rescinded the contract is in variance with the facts. Equity will not recognize the rescission of a contract when the rescinding party subsequently takes the benefits under the contract. *Neet v. Holmes,* 25 Cal. (2d) 447, 458, 154 P. (2d) 854. It desires to retain the $36,525.20 profit which was the result of Montgomery Brothers' efforts. Fenwal attempts to rescind the orders that Montgomery had placed with Fenwal, and at the same time, accepts the benefits of those orders. Equity will not permit both. When Fenwal accepted the assignment of those orders, Fenwal accepted the benefits under the contract.

Fenwal vainly attempts to abrogate that rule of equity by stating that the assignment was under a carefully worded written contract, and, where the parties have so done, there is no room for a court to create additional obligations (Appellant's Brief, page 15). This statement ignores the fact that this contract was deliberately worded so that none of the rights of either party were set forth therein or affected thereby all the rights and obligations of both parties are incorporated into that assignment only by reference, and not by enumeration.

The last contention made by Fenwal is that the finding of the trial court that Montgomery had a right to recover in quasi contract necessarily requires as a premise that the contract between Fenwal and Montgomery had been validly rescinded by Fenwal.

The attention of the court is respectfully called to the following facts: that that contract required Montgomery to continue to obtain and forward orders to Fenwal throughout the entire 60-day period; that the very nature of these orders required scheduled shipments extending long beyond the termination period; that at the time of the assignment, the 60-day period subsequent to the termination notice had run its course and the contract had terminated; that under the course of business prior to termination, Montgomery had recovered its profits from the customer and not from Fenwal; and that the termination of the contract made it impossible for Montgomery to continue business with Fenwal's customers for the purpose of collecting for the orders previously placed.

Because it is the clear intent of the contract and of the parties that Pacific Coast customers should not deal with different representatives of Fenwal for contracts given at different dates, it became necessary that Montgomery assign its contracts to Fenwal. This assignment was a necessary result of the termination provision, and equity will construe the contract to so provide. *Restatement of Contracts,* Section 262; *California Civil Code,* Section 1655; *Acme Oil & Min. Co. v. Williams,* 140 Cal. 681, 685, 74 Pac. 296.

Just as the contract required, by implication, that the contracts be assigned, it likewise implied that Montgomery would be reimbursed by Fenwal for the services rendered. *Restatement of Restitution,* Section 107 (2); 1 *Corbin on Contracts* 322, Section 102.

It is uncontroverted that the orders were obtained at the special instance and request of Fenwal; that it was well known to Fenwal that pursuant to that request Montgomery expended time, effort and money to obtain the orders; that Montgomery's services were not performed gratuitously; and that these services resulted in a great benefit to Fenwal both financially and in good will.

Where the contract is silent as to the terms of termination, the law does not allow an unjust enrichment and will imply conditions in quasi contract.

Corbin states in his treatise on *Contracts,* Vol. 3, page 161, Section 561:

> "What is an implied promise and what is the process called 'implication'? These are variable terms. When a court finds a promise by implication, its procedure may be nothing more than ordinary interpretation of word symbols. It may be the interpretation of a person's acts and conduct not including words; it may be the judicial determination that a legal duty exists, stating the result in the language of promise without doing anything that can properly be called interpretation; or it may be a combination of any two of these or of all three at once.
>
> When a promise is said to be 'implied in fact' we are describing one that is found by interpre-

> tation of a promisor's words or conduct. When a promise is said to be 'implied in law,' we are declaring the existence of a legal duty created otherwise than by assent and without any words or conduct that are interpreted as promissory. *As a substitute for contract 'implied in law,' the term quasi contract is now often used,* * * *" (Italics ours).

On page 181 of the same volume, Corbin quotes from Webber, *The Effect of War on Contracts,* Ed. 2 (1946), page 414:

> "The time has come to shed the fiction of 'implied contract' and regard the doctrine as a *mode by which, upon the facts of a case, the court itself does justice in circumstances for which the parties never provided."*

The trial court refused to find that any of Montgomery's acts deprived Montgomery of its right to call for "a court evolved formula for construction of the termination clause" (R. 74). The nature of the contract required Fenwal to reimburse Montgomery for services rendered and benefits received.

The prior contract between the parties is ample evidence of the understanding of both parties as to the value of Montgomery's services. If Fenwal wished to show other factors contributing to a different finding, such evidence would have been received by the Court. There was no proffer, and the Court's ruling is amply supported by the evidence.

CONCLUSION.

A reading of the cases cited by counsel show that they are inapplicable to the factual situation presented. Each case refers to the law applicable where the transaction is on a cash basis, whereas each transaction involved in the instant case was admittedly on a credit basis.

The Court did not err in holding that Montgomery was not deprived of the right to call for a court evolved formula for construction of the termination clause.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Dated, San Francisco, California,
July 9, 1951.

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